Office Supreme Court U. S.
FILED
JAN 13 1904
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

C. W. CORNELL AND F. B. CORNELL, copartners, doing business under the name and style of Cornell Brothers, plaintiffs in error,
v.
F. E. COYNE, LATE UNITED STATES collector of internal revenue, first district of Illinois, defendant in error.

No. 118.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

10917

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

C. W. CORNELL AND F. B. CORNELL, copartners, doing business under the name and style of Cornell Brothers, plaintiffs in error,
v.
F. E. COYNE, LATE UNITED STATES collector of internal revenue, first district of Illinois, defendant in error.

No. 118.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF IN BEHALF OF DEFENDANT IN ERROR.

STATEMENT.

This is a writ of error to the circuit court of the United States for the northern district of Illinois, seeking reversal of the judgment of that court sustaining a demurrer to plaintiffs' declaration, wherein they asked to recover from defendant certain sums of money paid for revenue stamps purchased of him, while acting as United States collector of internal revenue, and placed upon packages of filled cheese manufactured by them

16616—04——1

in the State of Illinois and exported under contracts therefor made before the process of manufacture began.

By act of June 6, 1896 (29 Stat., 253, C. 337), the Congress defined filled cheese, and provided:

> SEC. 9. That upon all filled cheese which shall be manufactured there shall be assessed and collected a tax of one cent per pound, to be paid by the manufacturer thereof; and any fractional part of a pound in a package shall be taxed as a pound. The tax levied by this section shall be represented by coupon stamps; and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section.

The act does not exempt from the tax cheese exported, nor does it provide for drawbacks of the amount paid thereon when the same are actually shipped out of the country. No discrimination is made against such filled cheese as may be intended for export, but all filled cheese manufactured in the United States is treated in precisely the same way whether it be for export or domestic consumption.

Section 3385 of the Revised Statutes provides:

> Manufactured tobacco, snuff, and cigars intended for immediate exportation may, after being properly inspected, marked, and branded, be removed from the manufactory

> in bond without having affixed thereto the stamps indicating the payment of the tax thereon. The removal of such tobacco, snuff, and cigars from the manufactory shall be made under such regulations, and after making such entries and executing and filing with the collector of the district from which the removal is to be made such bonds and bills of lading, and giving such other additional security as may be prescribed by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury; there shall be affixed to each package of tobacco, snuff, and cigars intended for immediate export, before it is removed from the manufactory, an engraved stamp, indicative of such intention. * * *

Proceeding under the act of June 6, 1896, defendant Coyne required plaintiffs to place upon all filled cheese manufactured by them, before shipment from the factory, coupon stamps at the rate of 1 cent per pound, notwithstanding it was made under a contract for immediate exportation and was about to be sent abroad. They claim the imposition and collection of such a tax was not authorized by the statute, and if authorized, it is in violation of the Constitution.

In their declaration (Rec., 4)

> Plaintiffs aver that at various times subsequent to the said 1st day of August, A. D. 1897, and prior to the 1st day of April, 1901, the plaintiffs entered into various contracts in London and Liverpool, England, under

and by the terms of which they agreed to manufacture, at their said factory, in the district aforesaid, certain large quantities of filled cheese, and export and deliver the same in Liverpool and London, in the Kingdom of Great Britain, in certain fixed quantities and at certain intervals and periods of time covered by and mentioned in said contracts; that no filled cheese was at any time after the said 1st day of August, A. D. 1897, and prior to the said 1st day of April, A. D. 1901, manufactured by the plaintiffs in said district, or elsewhere, except under contracts made and entered into by the plaintiffs as aforesaid, and that under and in pursuance of said contracts plaintiffs did from time to time subsequent to the 1st day of August, A. D. 1897, and prior to said 1st day of April, A. D. 1901, manufacture large quantities of filled cheese, to wit, 1,580,479 pounds thereof, all of which was shipped directly from plaintiffs' factory, in the district aforesaid, and exported by them to London and Liverpool, and the same was sold in and consigned direct to markets and countries wholly without the United States.

They further aver (Rec., 5)—

That each quantity or installment of filled cheese manufactured, exported, and delivered by the plaintiffs under said contracts was forwarded by the plaintiffs as soon as the same was ready for shipment from their factory in said district, and prior to the shipment thereof the plaintiff applied to the

defendant, as such collector, for permission to ship and forward the same without purchasing and attaching to said filled cheese, or to the said packages containing the said filled cheese, the revenue stamps required by an alleged act of Congress, approved June 6, A. D. 1896, with reference to internal revenues; but notwithstanding the fact that such filled cheese was manufactured for export, and was about to be delivered by the plaintiffs for export and shipment to a foreign market, and notwithstanding the provisions of said section 9, article 1, of the Constitution of the United States, the defendant, assuming to act as such collector of the said internal-revenue district, and assuming and pretending to act under and by virtue of said alleged act of Congress, approved June 6, A. D. 1896, did, at various times during said period, and on the dates of shipment of said filled cheese, by force and duress, exact, demand, and collect from the plaintiffs large sums of money, amounting in the aggregate to, to wit, $20,000, and upon the claim and under the pretext that the same was a general assessment as an internal-revenue tax upon the said commodities. That the plaintiffs objected and protested against the said requirement of said defendant; * * * but notwithstanding said protests repeated threats were made by the defendant to arrest and prosecute the plaintiffs, * * * unless the plaintiffs would immediately procure and purchase revenue stamps as required by the

said act, and attach the same to the said packages before delivering the same to be forwarded in the manner aforesaid; and governed wholly by said threats of arrest and prosecution, and not otherwise, said plaintiffs did make a written requisition upon the defendant as said internal revenue collector, for internal revenue stamps to be attached by them to the packages of filled cheese included in each of the said shipments, which said revenue stamps amounted in the aggregate to a large sum of money, to wit, the sum of $20,000.

The second count of the declaration alleges that plaintiffs were unlawfully compelled to place stamps "upon a certain commodity known as filled cheese, and manufactured by the plaintiffs for export trade, and which had theretofore been sold by them in foreign markets wholly without the United States, and which was ready to be delivered by the plaintiffs to be forwarded to be delivered in such foreign markets, at the time when the said internal revenue thereon had been wrongfully collected by the defendant."

Demand having been made for the return of the money paid for stamps, as provided by law, plaintiffs instituted this suit to recover the amount thereof.

A general demurrer to the declaration was sustained by the circuit court.

A writ of error was sued out and the case brought directly to this court as one "that involves the

construction or application of the Constitution of the United States."

Two contentions are presented by plaintiffs:

First—

Section 9 of the act of June 6, 1896, provides:

> The tax levied by this section shall be represented by coupon stamps, and the provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section.

Section 3385, Revised Statutes, provides that manufactured tobacco, snuff, and cigars intended for immediate export may be removed from the factory in bond without having affixed thereto the stamps indicating payment of tax, under such regulations as may be prescribed, and that to each package a stamp indicating the purpose to immediately export shall be affixed, etc.

Plaintiffs maintain that under said provisions they should have been permitted to withdraw filled cheese for export, without affixing revenue stamps, under the same terms and conditions that a manufacturer of tobacco could have sent out a package from his factory.

Second—

All the filled cheese produced by them was manufactured under and in compliance with their valid

contracts to make and export the same to England, and was ready and about to be delivered for such export and shipment to, and delivery in, a foreign market, when they were required to attach revenue stamps thereto. Therefore, they say, such cheese was included in the terms "articles exported from any State" upon which paragraph 5, section 9, article 1, of the Constitution provides "no tax or duty shall be laid."

The defendant denies both of these contentions.

ARGUMENT.

It was not the purpose of the act of June 6, 1896, to exempt from the tax imposed thereby filled cheese exported from any State.

Nowhere in the text of the act is there an intimation that filled cheese manufactured in the United States is under any circumstances to escape taxation. On the contrary, it provides (sec. 9):

> Upon *all* filled cheese which shall be manufactured there shall be assessed and collected a tax of 1 cent per pound, to be paid by the manufacturer thereof. * * *

The tax levied by section 9 it specifies shall be represented by coupon stamps. Then immediately follow directions as to the engraving, issue, etc., of such stamps in these words:

> The provisions of existing laws governing the engraving, issue, sale, accountability, effacement, and destruction of stamps re-

lating to tobacco and snuff, as far as applicable, are hereby made to apply to stamps provided for by this section.

Section 16 provides for the forfeiture of all packages of filled cheese found without stamps.

Section 18 gives the Commissioner of Internal Revenue authority to make all necessary regulations for carrying the act into effect.

Section 3385 of the Revised Statutes provides for relieving manufactured tobacco, snuff, and cigars, intended for immediate export, from the stamp tax, specifying with considerable detail how such exemption is to be secured; and as evidence of such intent to immediately export directs that a peculiar stamp, to be furnished by the collector, be affixed to each package.

Sections 3369–3376, Revised Statutes, make provision for the engraving, issue, sale, accountability, effacement, and destruction of revenue stamps relating to tobacco and snuff, while section 3385, Revised Statutes, provides the method to be pursued when release from taxation of tobacco, etc., intended for export, is sought, the stamp to be affixed being merely indicative of such intention.

It seems manifest that section 3385, Revised Statutes, has no sort of applicability to the engraving, issue, sale, accountability, effacement, or destruction of excise stamps relating to tobacco and snuff, and certainly, as it in no way relates to any of these things, it can not be construed to apply to

revenue stamps designated by the act of 1896, and especially can not exempt from tax the very article which, without exception, said act subjects thereto.

The title and preamble of an act are no part of it and can not enlarge or confer powers or control the words of the same unless they are doubtful or ambiguous.

Yazoo and Miss. Val. R. R. Co. v. *Thomas*, 132 U. S., 174, 188.
Price v. *Forrest*, 173 U. S., 410, 427.

There is no doubt or ambiguity about the imposition of a tax upon *all* filled cheese manufactured in the United States by the act in question, and although its title may indicate a purpose to regulate *exportation* of filled cheese, there is, in fact, nothing in its body attempting to carry out any such purpose.

The principles laid down by this court in Turpin v. Burgess are decisive of the present controversy.

The act of Congress passed June 6, 1896 (29 Stat., 253, C. 337) imposes a tax upon *all* filled cheese manufactured within the United States, without discrimination, and makes no provision exempting therefrom, or granting drawbacks on account of any such cheese which may be exported. The tax takes effect while the articles are in the factory, before they start therefrom for domestic consumption, or in course of transporta-

tion; and it is not laid by reason of exportation or intended exportation.

Upon the authority of *Turpin* v. *Burgess* (117 U. S., 504, April 5, 1886), the validity of the tax now called in question seems beyond successful dispute. In that case suit was brought to recover from an internal-revenue collector the amount paid (25 cents each) for stamps affixed to certain cases of manufactured tobacco intended for exportation. Plaintiffs maintained the exaction was a tax and unconstitutional, being in violation of the paragraph which declares "no tax or duty shall be laid on articles exported from any State." The act of Congress passed July 20, 1868, imposed an excise tax of 32 cents per pound on manufactured tobacco, and required the same to be paid by purchasing stamps and affixing them to the packages before being removed from the factory; but tobacco intended for exportation was relieved from payment of this tax, provided there was affixed to each package, before removal, a stamp sold by the Government for 25 cents, engraved to indicate intent to export.

In the case of *Pace* v. *Burgess* (92 U. S., 372, 1875)—opinion by Justice Bradley—the questions raised in *Turpin* v. *Burgess* were before the court, and they were of opinion that the stamp required to be affixed was a means devised for the prevention of fraud, by separating tobacco intended for exportation, and that the requirement did not in

any proper sense impose a tax or duty thereon. After the decision of *Pace* v. *Burgess*, Congress abolished all charges for the exportation stamp by an act entitled "An act to repeal so much of section 3385 of the Revised Statutes as imposes an export tax on tobacco," and in the Turpin case it was argued that this language was an admission by Congress that the charge originally made for the stamp was an export tax, and the court was accordingly not bound by its former holding. This court, while refusing to depart from its first opinion as to the result of the requirement of an export stamp, gave an additional reason for denying the relief sought by the plaintiff. Justice Bradley, speaking for a unanimous court (p. 506), said:

> There is another view of this subject, however, independent of the considerations which governed our former decision, which is equally decisive of this case. We have lately decided, in *Coe* v. *Errol* (116 U. S., 517), that goods intended for exportation to another State are liable to taxation as part of the general mass of property of the State of their origin until actually started in course of transportation to the State of their destination, or delivered to a common carrier for that purpose, provided they are taxed in the usual way in which such property is taxed, and not taxed by reason or because of such exportation, or intended exportation, and that the carrying of them to and depositing them at a depot for the purpose of

transportation is no part of that transportation. Now, the constitutional prohibition against taxing exports is substantially the same when directed to the United States as when directed to a State. In the one case the words are, "No tax or duty shall be laid on articles exported from any State." (Art. 1, sec. 9, par. 5.) In the other they are, "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports." (Art. 1, sec. 10, par. 2.) The prohibition in both cases has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation, or whilst they are being exported. That would be laying a tax or duty on exports, or on articles exported, within the meaning of the Constitution. But a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition. How can the officers of the United States or of the State know that goods apparently part of the general mass, and not in course of exportation, will ever be exported? Will the mere word of the owner that they are intended for exportation make them exports? This can not for a moment be contended. It would not be true, and would lead to the greatest frauds.

It is true, as was conceded in *Coe* v. *Errol*, that the prohibition to the States against laying duties on imports or exports related to imports from and exports to foreign

countries; yet the decision in that case was based on the postulate that when such imposts or duties are laid on imports or exports from one State to another, it amounts to a regulation of commerce among the States, and, therefore, is an invasion of the exclusive power of Congress. So that the analogy between the two cases holds good, and what would be constitutional or unconstitutional in the one case would be constitutional or unconstitutional in the other.

In the present case the tax (if it was a tax) was laid upon the goods before they had left the factory. They were not in course of exportation; they might never be exported; whether they would be or not would depend altogether on the will of the manufacturer. Had the same excise which was laid upon all other tobacco manufactured by the plaintiffs been laid on the tobacco in question they could not have complained. * * *

On both grounds we are satisfied that the plaintiffs are without any cause of action, and the judgment of the circuit court is affirmed.

Nothing said by this court since its decision, of which I am aware, has in any way modified or called in question the doctrine laid down in *Turpin* v. *Burgess*, and unless that be overruled the judgment of the circuit court in this case must be affirmed. The point relied upon there had been before the court in *Pace* v. *Burgess* (1875), *Brown* v. *Houston* (1885, 114 U. S., 622), and *Coe* v. *Errol*, Jan. 25, 1886 (116 U. S., 517), in each of which

Justice Bradley wrote the opinion of a unanimous court, and the language used was evidently the result of careful deliberation upon a point clearly raised.

Justice Miller, in his lectures on the Constitution (p. 593), says:

> The Congress of the United States during the late civil war imposed a tax upon cotton and tobacco, which tax was not limited to those products when in the process of transportation, but was assessed on all the cotton and tobacco in the country. It was argued that because the larger part of these products was exported out of the country and sold to foreign nations, and because their production was limited to a particular part of the country, the tax was forbidden by the corresponding clause of the Constitution prohibiting Congress from levying a tax on exports. Although the question came at that time to the Supreme Court of the United States, it was not then decided, because of a division of opinion in that court. The recent cases, however, of *Coe* v. *Errol* (116 U. S., 517) and *Turpin* v. *Burgess* (117 U. S., 504) seem to decide that the objection was not valid, and hold that only such property as is in the actual process of exportation, and which has begun its voyage or its preparation for the voyage, can be said to be an export.
>
> [The act of July 1, 1862 (12 Stat., 432), sec. 75 (p. 465), imposed a tax of one-half

cent per pound on cotton. Section 116 (p. 488) of the same act granted, upon exportation, an allowance or drawback of the tax paid on articles, "except raw or unmanufactured cotton." The act of March 7, 1864 (13 Stat., 14–16), raised the tax on cotton to 2 cents per pound.]

It is not possible to destroy the effect of the above-mentioned holding of the court in *Turpin* v. *Burgess* by calling it *obiter dicta*. The point was distinctly raised and insisted upon, and while there was another valid defense to the plaintiff's contention, it was eminently proper for the court to announce a second ground upon which its decision could be supported, and thus put a most important question in issue forever at rest. I know of no doctrine which permits a part of an opinion to be called *obiter dicta* and to be disregarded simply because there was another adequate ground for the decision, beside the one being then discussed.

In view of the fact that the tax upon filled cheese accrued immediately upon its manufacture—whether the same was intended for export or domestic consumption—and that no cheese could be removed without the payment of the prescribed tax, it seems that counsel for plaintiff is in manifest error when he says in his brief (p. 39) that "the taxes in this case were levied and collected at the times complained of simply be-

cause this filled cheese was about to be delivered to a transportation company to be exported to a foreign country."

The same tax would have been levied and collected before the cheese could have been delivered to a grocer whose shop adjoined the manufactory.

Early revenue laws did not recognize the doctrine contended for by plaintiffs in error, and taxed manufactured articles, although intended for exportation.

The first internal-revenue act after the Constitution went into effect (1 Stat., 199, C. 15) was passed March 3, 1791, at the third session of the First Congress. It imposed (sec. 15) upon spirits distilled within the United States a tax of 11 cents per gallon, and made elaborate provision for its collection. After providing for both tax and collection, the statute continued:

> And for the encouragement of the export trade of the United States:
>
> SEC. 51. *Be it further enacted*, That if any of the said spirits (whereupon any of the duties imposed by this act shall have been paid or secured to be paid) shall * * * be exported from the United States to any foreign port or place, there shall be an allowance to the exporter or exporters thereof, by way of drawback, equal to the duties thereupon according to the rates in each case by this act imposed, deducting therefrom half a cent per gallon. * * *

Subsequent sections provided the drawback should not be paid until six months after the spirits were exported, and should be allowed in no case where they were shipped out in a vessel of less than 30 tons burden.

This bill "did not steal upon an unsuspecting legislature unobserved. Its principle was completely understood, and was opposed with equal zeal and ability." It will be observed that it did not wholly exempt distilled liquors intended for export from the effect of the tax, but clearly provides that one-half cent a gallon shall be collected upon the same; and the favor extended thereto was for the encouragement of the export trade of the United States. No one at that time seemed to think the act violated the provision of the Constitution prohibiting a duty or tax on articles exported.

By act of December 21, 1814 (3 Stat., 152, C. 15), the Congress laid an excise of 20 cents per gallon upon distilled spirits, and no provision was made to release therefrom spirits exported by grant of drawback or otherwise.

These two statutes, passed in the early days of the Government, are persuasive evidence that the provision of the Constitution in question (art. 1, sec. 9, par. 5) does not mean what counsel for plaintiffs contend. They both did what is now claimed to be unconstitutional, viz, laid a tax on manufactured goods, notwithstanding such articles may have been actually intended for, and were in

fact shipped out of the country. And the existence of these statutes negatives the suggestion contained in the brief of counsel for plaintiff in error (at p. 24) that the act of 1896 imposing a tax on filled cheese is "the only internal-revenue act ever passed by Congress which failed to provide for the exportation of the commodity taxed without the payment of the tax."

Mere intention or contract to export goods does not constitute them articles of commerce and make laying a tax upon them contrary to the provisions of the Federal Constitution.

What are "articles exported from any State," within the meaning of paragraph 5, section 9, article 1 of the Constitution, upon which "no tax or duty shall be laid?"

The verb "export," from the two Latin words, *ex*, out, and *portare*, to carry, is defined thus: "To carry or send abroad, or out of a country, especially to foreign countries, as merchandise or commodities in the way of commerce; the opposite of *import;* as, to *export* grain, cotton, cattle, goods, etc." (Webster's Inter. Dic.)

The word "exported" manifestly refers to an accomplished act, and can in no proper sense be construed to mean something merely intended or contracted to be done in the future. Articles exported are things which have been sent out, not those merely to be sent. The idea conveyed has

reference to something completed. If the legislature should impose a tax on all profits *gained* in business, no one would claim that it accrued until they were actually acquired, and an effort made to collect upon such as were expected or contracted for would appear very absurd.

In *United States* v. *Steamboat Forrester* (Fed. Cases, No. 15132), the court said:

> The term as used is import, and legislation employed that term in its commercial sense, which is to bring from a foreign jurisdiction into this jurisdiction merchandise not the product of the country. Its commercial meaning is directly contrary to the term export. Both phrases have a technical meaning in the law. We import teas from China, wine from France. We export cotton, tobacco, pork, and wheat. The one term signifies, etymologically, to bring in; the other, to carry out.

In *Muller* v. *Baldwin* (L. R. 9 Q. B., 457, 1874) the court, construing the meaning of a statute levying dues in respect of coals "exported from the port," said:

> There is nothing in the language of the act to show that the word "exported" was used in any other than its ordinary sense, namely, carried out of the port.

Paragraph 5, section 9, Article I of the Constitution provides: "No tax or duty shall be laid on articles exported from any State."

Paragraph 2, section 10, Article I, provides: "No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws * * *."

An export is "a commodity conveyed from one country or State to another, in the way of traffic." (Webster's Dic.) It is necessarily an article exported from or carried out of a State or country.

In the first draft of the Constitution as reported to the convention of 1787 by the committee on detail, section 4 of Article VII provided: "No tax or duty shall be laid by the legislature on articles exported from any State;" and Article XIII provided, "No State, without the consent of the legislature of the United States, shall * * * lay imposts or duties on imports * * *."

The above provision denying to Congress power to tax exports was first taken up, and after elaborate argument in which it appears everybody understood the words "articles exported" to mean the same thing as "exports," was agreed to. (Elliot's Debates, vol. 5, 432, 433, 454, et seq.) It is plain from the debates that the prohibition was intended to prevent Congress from doing the same thing the States had long been accustomed to do in reference to goods actually shipped from their ports. Pennsylvania had exported the produce of Delaware and New Jersey, and Virginia

had shipped abroad tobacco raised in North Carolina; and both Pennsylvania and Virginia had levied export taxes on such articles from other States as well as from themselves before permitting shipment thereof. And it was in reference to these and similar well-known practices, which had long existed, that the provision was adopted.

Mr. Madison, in opposition to the proposed restriction on the power of Congress, said: "The regulation of trade between State and State can not effect more than indirectly to hinder a State from taxing its own exports, by authorizing its citizens to carry their commodities freely into a neighboring State which may decline taxing exports in order to draw into its channel the trade of its neighbors." (Elliot's Debates, vol. 5, p. 455.)

Mr. Gouverneur Morris, likewise in opposition to the restriction, said: "He considered the taxing of exports to be in many cases highly politic. Virginia has found her account in taxing tobacco. All countries having peculiar articles tax the exportation of them—as France her wines and brandies." (Elliot's Debates, vol. 5, 433.)

The thing in the minds of all in the convention was a tax levied because of exportation and at the time such exportation actually took place by shipment to a foreign State or country. If it had occurred to Mr. Madison that an article was an export and subject to tax as such by that State the moment a man in Virginia contracted to make and

ship it abroad, he could not have suggested that the tax could be avoided by sending the article out through the port of a State which laid no such tax.

When article 13 of the original draft was reached, it was, with little discussion, amended by adding after "imports" the words "or exports." "Mr. Madison liked the motion as preventing all State imposts," and "Mr. Gouverneur Morris thought the regulation necessary to prevent the Atlantic States from endeavoring to tax the Western States and promote their interest by opposing the navigation of the Mississippi, which would drive the western people into the arms of Great Britain." (Elliot's Debates, vol. 5, p. 487.) (See also on the general subject of the provisions relating to taxes on exports, Curtis' Const. Hist., vol. 1, 496, 504, 550.)

The character of State legislation prior to 1787, in reference to taxing exports, is illustrated by the statutes, reference to which follows:

Mercer's Abridgment of the Public Acts of Virginia, in force January 1, 1758.

32 Car. II (1680), c. 2.

> SEC. I. For every hogshead of tobacco exported, the exporter shall pay two shillings current money of England, and so for every five hundred pounds of tobacco exported in bulk, or otherwise, and so proportionably;

the same to be to the King, his heirs and successors.

* * * * *

IV. The said duty shall be paid for all tobacco shipped in this colony for exportation, though not made here.

IX. The duties aforesaid shall be paid to the several collectors and officers appointed to receive the same, for the uses and purposes mentioned in Section I.

Laws of Virginia, 1705 (Henning's Stat. at Large, vol. 3, 356), Chapter XXIX.

An act for laying an imposition upon skins and furs; for the better support of the College of William and Mary, in Virginia.

This act provided in substance—

I. There shall be satisfied and paid to her Majesty the following duties, customs, and imposts for the following goods, wares, and merchandises, which shall be exported and carried out of this her Majesty's dominion, either by land or water: For every raw hide, three pence; * * * for every dozen of raccoon skins, three pence, etc.

II. That the said duties, customs and imposts, shall be paid and satisfied by the person or persons exporting or carrying out the same, either by land or water, * * * before the said goods, wares, and merchandizes shall be shipped off, exported, or carried out of and from this dominion, either by land or by water; and a certificate thereof shall be obtained of the collector or collectors of the district where such goods,

wares, and merchandizes shall be exported or carried away, signifying the payment and satisfaction of such duties, customs and imposts, as aforesaid.

Statutes of South Carolina, vol. 2, 1682 to 1716, p. 64. (A. D. 1691.)

An act for laying a tax or duty on skins or furrs for the public use of this province and regulating the Indian trade.

This act provided that "a tax or duty be laid and leavyed on all skins and furrs exported from any part of this province;" and "if any skins or furrs whereof the duties aforesaid are or shall be due shall at any time after the ratification of this act be shipped or put into any boat or vessel to the intent to be carried into the parts beyond the seas or anywhere without the limitations of this Government, the duties due, or to be due for the same, not being paid," * * * all such skins and furrs so shipped shall be forfeited * * *.

It further provides that all merchants or other persons, before they have liberty to load any skins or furs on shipboard, shall make a written statement of their intent so to do and pay the duties to the officer designated.

Laws of Maryland, 1704. (Bacon's Laws of Maryland, 1704), chapter 27.

This act provided that no person inhabiting or residing within said province shall export any furs or skins without paying the several duties and imposts specified, and that all nonresidents that

shall export out of this province any such furs or skins shall pay double the duty appointed to be paid by persons inhabiting or residing therein. That any person exporting such furs shall at or before shipping on board any vessel in which they shall be exported render an account of the same to the proper officer. That any person, not being an inhabitant of the province, exporting therefrom any pork, beef, or bacon shall pay the imposts specified to the proper naval officers as in case of furs.

In *Brown* v. *Maryland* (12 Wheat., 444) Chief Justice Marshall said: "The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State. There is some diversity in language, but none is perceivable in the act which is prohibited."

The terms "exports" and "articles exported," in construing constitutional provisions, have been constantly used by this court as interchangeable and as meaning the same thing.

Brown v. *Maryland*, 12 Wheat., 419.
Woodruff v. *Parham*, 8 Wall., 131.
License cases, 5 Wall., 462, 471.
Coe v. *Errol*, 116 U. S., 517.
Dooley v. *United States*, 183 U. S., 154.
Fairbanks v. *United States*, 181 U. S., 283.
Story on Constitution, sec. 1014.

Counsel for plaintiffs is in manifest conflict with the foregoing authorities and the opinions entertained by members of the Convention of 1787 in the conclusion which they announce as to the meaning of the words "articles exported," without citation of anything to sustain it, at page 19 of their brief, in the language following:

> It seems, therefore, that the words "articles exported," as used in section 9 of the Constitution, include any and all products which may at any time be exported, and relate to such products in their general character or condition before as well as after exportation has actually commenced; while the word "exports," as used in section 10, has a more limited significance, and relates not to the character of such products generally, but simply has reference to their character as exports, and at the time when and after exportation has actually commenced.

What is said in reference to the meaning and significance of the word "exports" in this quotation from counsels' brief is justified by the authorities upon the subject, and the terms "articles exported" mean the selfsame thing.

Counsel for plaintiffs appear likewise in conflict with the opinions of this court when they assume inferentially in the argument made on page 21 of their brief that the sole purpose of the restriction on the power of Congress contained in paragraph

5, section 9, Article I, of the Constitution, was to avoid unjust discrimination between the States by preventing the levy of a tax upon articles produced alone in one section, and in effect concludes that an excise tax on such articles would therefore be invalid.

In *Fairbank* v. *United States* (181 U. S., 283), replying to the argument that Congress was prohibited from laying a tax or duty on articles exported from any State in order alone to prevent inequality of taxation among the States, Justice Brewer said (p. 292):

> This argument does not commend itself to our judgment. Its implication is that the sole purpose of this constitutional restriction was to prevent discrimination between the States by imposing an export tax on certain articles which might be a product of only a few of the States, and which should be enforced only so far as necessary to prevent such discrimination. If mere discrimination between the States was all that was contemplated, it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to this constitutional prohibition. But surely under this limitation Congress can impose an export tax neither on one article of export, nor on all articles of export. In other words, the purpose of the restriction is that exportation—all exportation—shall be free from national burden. This intent, although obvious from

> the language of the clause itself, is reenforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word "duty" the words "for the purpose of revenue," but the motion was voted down. So it is clear that the framers of the Constitution intended not merely that exports should not be made a source of revenue to the National Government, but that the National Government should put nothing in the way of burden upon such exports.

In *Knowlton* v. *Moore* (178 U. S., 41, 96, 106), the court clearly decided that the uniformity of excises contemplated by the Constitution had reference to a "geographical uniformity" and that the purpose was that such exactions should "operate generally throughout the United States," "that is, to be laid to the same amount on the same articles in each State."

Article I, section 8, of the Constitution, gives Congress power "to regulate commerce with foreign nations and among the several States and with the Indian tribes."

It is now well settled that the words "imports" and "exports," when they appear in the Constitution, apply only to articles brought from, or sent to, foreign countries, and are used solely in reference to foreign commerce.

Woodruff v. *Parham*, 8 Wall., 123.
Fairbanks v. *United States*, 181 U. S., 283.
Dooley v. *United States*, 183 U. S., 154, 162.

Every export, therefore, is an article of "commerce with foreign nations," and necessarily "articles exported from any State" are likewise of "commerce with foreign nations." Nothing can become an article exported from a State until it becomes a part of foreign commerce.

As to goods produced in any State and shipped out of the same, their destination determines whether they are articles of commerce with foreign nations or among the several States. Manifestly, such goods can not become articles of foreign commerce until all the conditions are fulfilled which would have been necessary to make them articles of commerce among the States, had their destination been to another State instead of abroad.

In *Coe* v. *Errol* (*supra*), which has been cited and approved time and again by this court, speaking in reference to logs cut in New Hampshire and lying on the bank of a stream awaiting shipment to Maine, Justice Bradley (p. 525) said:

> Such products are not yet exports nor are they in process of exportation, nor is exportation begun until they are committed to the common carrier for transportation out of the State to the State of their destination, or have started on their ultimate passage to that State. Until then it is reasonable to regard them as not only within the State of their origin, but as a part of the general mass of the property of that State, subject to its jurisdiction, and liable to taxation

> there, if not taxed by reason of their being intended for exportation, but taxed without any discrimination in the usual way and manner in which such property is taxed in the State.

Nothing produced in any State can become an article of interstate commerce until committed to a common carrier for transportation out of the State, or until it has started on its ultimate passage to another State. The same rule—except as to destination only—must determine the moment when an article of foreign commerce becomes such.

In *Gibbons* v. *Ogden* (9 Wheat., 1–202) Mr. Chief Justice Marshall said:

> But the inspection laws are said to be regulations of commerce, and are certainly recognized in the Constitution as being passed in the exercise of a power remaining with the States. That inspection laws may have a remote and considerable influence on commerce, will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived, can not be admitted. The object of inspection laws is to improve the quality of articles produced by the labor of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce or of commerce among the States, and prepare it for that purpose.

Turner v. *Maryland* (107 U. S., 38, 50).

The validity of certain inspection laws passed by the State of Maryland relating to tobacco were called in question. The general provision of the Maryland statute was that it should not be lawful to carry out of the State, in hogsheads, any tobacco raised in the State, except in hogsheads which should have been inspected, passed, and marked.

Justice Blatchford, delivering the opinion of the court, among other things, said (p. 50):

> The things required to be done in respect to the hogshead of tobacco in the present case, aside from any inspection of quality, are to be done to prepare and fit the hogshead as a unit, containing the tobacco, for exportation, and for becoming an article of foreign commerce or commerce among the States, and are to be done before it becomes such an article.
>
> (P. 54) Objection is made that the Maryland laws are not inspection laws, but are regulations of commerce, because they require every hogshead of tobacco to be brought to a State tobacco warehouse. But we are of opinion that, it being lawful to require the article to be subjected to the prescribed examination by a public officer before it can be accounted a lawful subject of commerce, it is not foreign to the character of an inspection law to require that the article shall be brought to the officer instead of sending the officer to the article.

The fact that an article is manufactured for export does not make it an article of commerce. There is a clear distinction between manufacture and commerce.

In *Kidd* v. *Pearson* (128 U. S., 1, 20, 21, 22) Mr. Justice Lamar, delivering the unanimous opinion of the court (p. 20), said:

> No distinction is more popular to the common mind or more clearly expressed in economic and political literature than that between manufacture and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation. The legal definition of the term, as given by this court in *County of Mobile* v. *Kimball* (102 U. S., 691, 702), is as follows: "Commerce with foreign countries, and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The

> result would be that Congress would be invested, to the exclusion of the States, with the power to regulate not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the States, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are and must be local in all the details of their successful management.
>
> It is not necessary to enlarge on, but only to suggest the impracticability of such a scheme, when we regard the multitudinous affairs involved, and the almost infinite variety of their minute details.

In *United States* v. *E. C. Knight Co.* (156 U. S., 1) the question involved was whether a monopoly of the business of manufacturing sugar was a restraint upon commerce and the court held that it was not. Chief Justice Fuller, delivering the opinion of the court (p. 12), said:

> Doubtless the power to control the manufacture of a given thing involves in a certain

> sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it and affects it only incidentally and indirectly. Commerce succeeds to manufacture, and is not a part of it. * * * (p. 13). The fact that an article is manufactured for export to another State does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the article or product passes from the control of the State and belongs to commerce.

The doctrine announced in *Kidd* v. *Pearson* and *United States* v. *Knight* (*supra*) is firmly established by the holdings of this court.

If the contention of counsel that a mere contract to manufacture and ship goods abroad, without more, converts them into exports be sustained, then the unfortunate results so forcibly expressed by Justice Lamar in *Kidd* v. *Pearson* must, at least in part, inevitably follow; and as the Constitution likewise prohibits the States from imposing imposts or duties on exports, they will no longer have the right to raise revenue by taxation upon articles manufactured under a contract for foreign delivery, and will be deprived of a source of revenue upon which they have always relied without question.

THE DEFENDANT IN ERROR RESPECTFULLY ASKS THAT THE JUDGMENT OF THE COURT BELOW BE IN ALL THINGS AFFIRMED.

JAMES C. MCREYNOLDS,
Assistant Attorney-General.

WASHINGTON, *January, 1904.*

O